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# Sticks and Stones in Cyberspace

*By Lisa L. Swem*

*"Sticks and stones may break my bones, but words will never hurt me."*

Bullying occurs throughout the K-12 school environment and comes in many forms. With the proliferation of interactive and digital technologies, cyberspace has become a new venue through which bullies can torment their victims. Unfortunately for the victim, technology can afford the bully a greater degree of anonymity and a wider audience.

Although the cyber-bully typically acts far away from the schoolhouse gate, school officials regularly deal with the aftermath of the behavior. But school discipline for off-campus conduct is vulnerable to legal challenge. Litigation challenging such discipline for cyberspace activity generally favors the student when First Amendment protections are implicated and school officials fail to link the conduct to disruption of the learning environment.

## First Amendment protection

In 1997, the U.S. Supreme Court ruled in *Reno v. ACLU* that speech on the Internet deserves the highest level of First Amendment protection.

Student speech has been afforded First Amendment protection since the court's 1969 ruling in *Tinker v. Des Moines Independent Community School District*. To justify discipline for student speech, school officials have the burden to demonstrate that the student's conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the schools" or "impinge upon the rights of other students."

The "material and substantial disruption" part of the test remains the standard by which courts analyze most student speech cases, including speech expressed in cyberspace.

While cyberspace is off campus, the initial inquiry must determine whether the student's conduct (posting or accessing a website) occurred off campus or at school. Discipline for conduct occurring at school or through school equipment is much less vulnerable to legal challenge, particularly if the conduct violated the school's acceptable use policy related to technology.

Most litigation is filed in reaction to pending disciplinary sanctions and seeks a court order prohibiting the school from imposing the discipline. In First Amendment cases, the key factor in determining if an injunction should be issued is whether the plaintiff or the school district will likely succeed on the merits of the case.

Most school district defendants attempt to meet this burden by showing that the expression was either a "true threat" or caused—or was reasonably expected to cause—a "material and substantial disruption" to the school environment.

First Amendment protections do not extend to certain types of speech, including threats of violence. As the Supreme Court instructed in a 2003 case, *Virginia v. Black*, "true threats" are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

To determine if a statement is a true threat and outside First Amendment protection, a court typically will examine the following factors:

- What was the speaker's intent?
- How did the intended victim react?
- Was the communication made directly to the victim?
- Was the threat conditional?
- Did the victim have reason to believe that violence would occur?

## A true threat

A recent federal court decision from New York illustrates how this analysis works. In *Wisniewski v. Board of Education of Weedsport Central School District*, an eighth-grade student created and attached to his computer's instant messaging feature an icon of a gun pointing to a head, a bullet leaving the gun, and blood splattering from the head. The icon was captioned "Kill Mr. Vander-Molen," referring to the student's English teacher. The student attached the icon to instant messages he forwarded from his home computer to about 15 friends, including classmates. His resulting suspension led to a lawsuit claiming that the discipline violated his First Amendment rights.

The court disagreed, concluding that the icon was a true threat and thus not protected under the First Amendment: "On their face, the words 'Kill Mr. Vander-Molen" and the accompanying graphic cannot be viewed as anything but an unequivocal, unconditional, immediate threat of injury specific as to the person threatened, such as conveys a gravity of purpose and imminent prospect of execution."

The court found surrounding circumstances supported this conclusion, including the effect of the icon on the teacher and school officials, the student's awareness of the school's position that a threat was no joke, the absence of any factor to the suggestion that the icon was a joke, and the general increase in school violence. The court concluded that "an ordinary, reasonable recipient who is familiar with the context of the icon would interpret it as a serious threat of injury."

True, this case involved a teacher victim rather than a bullied pupil. But a growing body of case law involves expressive cyberspace activity targeting school officials as well as students. While the facts and circumstances might differ, the

analyses courts use to determine if the expressive activity was protected under the First Amendment (and not a true threat) are consistent.

If the student's expressive activity is not a true threat, school officials must satisfy the *Tinker* requirement by producing evidence to establish that the expression created or threatened to create a "material and substantial disruption" to the school's operation.

Courts do not accept an administrator's mere pronouncement of material and substantial disruption based on an "undifferentiated fear." Rather, school officials have the burden to establish an actual or reasonable forecast of the disruption.

## Disciplinary actions

So far, court decisions involving conduct directed toward other students have found disciplinary actions unconstitutional. A review of these cases illustrates the factors school officials need to be aware of in these situations.

In a 2000 case from Washington, *Emmett v. Kent School District No. 415*, a student's webpage contained "mock obituaries" of some students and a poll soliciting votes to decide who would "die" next—meaning who should be the next subject of a mock obituary. The webpage also commented about school administration and faculty, but it included a disclaimer that the webpage was only for entertainment purposes. After a TV news story characterized the webpage as a "hit list," the student was placed on "emergency expulsion" (modified to a five-day suspension) for intimidation, harassment, and disruption of the educational process.

Acknowledging the difficulties facing administrators in the post-Columbine environment, the court nonetheless blocked the discipline, which it found unconstitutional because no evidence was presented that the website really threatened anyone or materially and substantially disrupted school operations.

In *Mahaffey v. Waterford School District*, a 2002 case from Michigan, a high school student was suspended for his "Satan's web page," which contained various lists, including one titled "People I Wish Would Die." The website also advocated rape, murder, drug use, membership in the Ku Klux Klan, and wreaking general havoc.

The site's "mission" directed readers to "stab someone for no reason and set them on fire and throw them off a cliff." Although the court agreed that the website was repugnant, it found the speech was protected by the First Amendment because it was not a true threat. Because no evidence was presented that the website caused a disruption to school, the court found the student's suspension unconstitutional.

That same year, another federal court in Ohio ruled in *Coy v. Board of Education of North Canton City Schools*, on a middle school student who created a website with insulting comments about other students described as "losers." It was not clear whether the student's resulting suspension was based on his misuse of a school computer or if it derived from the content of his website. The court ruled that it would be unconstitutional to discipline the student just because school officials did not like the website content.

## Off-campus actions

Then in 2003 a U.S. district court in Pennsylvania considered *Flaherty v. Keystone Oaks School District*, in which a school disciplined a student who posted messages described as "trash talking" about an upcoming volleyball match on an Internet website message board. The court found the discipline unconstitutional because the student's actions occurred off campus and created no material or substantial disruption of the school and did not interfere with the educational process or the rights of other students.

The cases involving off-campus expressive activity directed at school officials, as opposed to other students, generally ask the same two questions:

1. whether the expression is a true threat and therefore not protected by the First Amendment; and
2. whether the expression caused a material and substantial disruption to school operations or caused school officials to believe reasonably that it would do so.

In *Buessink v. Woodland R-IV School District*, a federal court in Missouri in 1998 blocked a student's 10-day suspension for his vulgar website. Finding no material and substantial disruption, the court noted that "disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech."

## Substantial disruption

In the 2000 case of *Beidler v. North Thurston School District No. 3*, a Washington high school student was placed on emergency suspension and recommended for expulsion for his "appalling and inappropriate" website, which depicted the assistant principal in unflattering roles, including a Viagra commercial, a cartoon character engaged in sex, and a participant in a Nazi book-burning. Here again, the state court ruled that the discipline was unconstitutional because there was no evidence of a material and substantial disruption to school.

In a 2001 Pennsylvania case, *Killion v. Franklin Regional School District*, a high school student created and e-mailed his friends a derogatory "Top Ten" list about the school athletic director and administration.

The federal court found that the student's 10-day suspension was unconstitutional because—you guessed it—the school had produced no evidence of a material and substantial disruption to the school. The court commented, "We cannot accept, without more, that the childish and boorish antics of a minor could impair the administrator's abilities to discipline students and maintain control."

In the following year, the Pennsylvania Supreme Court issued *J.S. v. Bethlehem Area School District*, which concerned a middle school student's website titled "Teacher Sux" featuring derogatory comments and images about teachers and the principal. One photo of a teacher's face, morphed into Adolf Hitler, was captioned, "Why Should [the teacher] Die?" An animated picture displayed the teacher's head cut off with blood dripping down the neck.

Although the court found that the statements were not a "true threat," in this case school officials were able to establish that the website interfered with the educational process. After viewing the website, the teacher had suffered from anxiety, weight loss, and stress and had to take a medical leave of absence that prevented her from completing the school year.

Finally, in another case from Pennsylvania this year, *Layshock v. Hermitage School District*, a high school student challenged his 10-day suspension for posting a spoof profile of his principal on MySpace.com (www.myspace.com), a popular Internet site where users can share photos, journals, personal interests, and the like with other users. Here again, school officials presented evidence that the student's actions materially and substantially disrupted school operations

and interfered with the rights of others, and the U.S. district court upheld the discipline.

## Plenty of options

Many of these court decisions, no doubt, may be frustrating to school officials, who are left wondering what really can be done to address cyber-bullying of students and school personnel.

The answer: Plenty. In these cases, school officials generally reacted to the situation by imposing discipline that had constitutional implications, but there are many other ways to address this conduct. They can confront the student, involve the student's parents, notify the Internet service provider, contact law enforcement, and refer the incident for a threat assessment.

Still, these decisions make clear that school officials who want to address online harassment or bullying through disciplinary action should carefully consider, when crafting and implementing policies, whether the student's conduct really constitutes a "true threat" or, if not, whether they are prepared to show evidence of the material and substantial disruption to the school environment the conduct caused.

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### MORE PRACTICAL TIPS ON DEALING WITH CYBER-BULLYING

- Make sure your school district's computer use policy includes cyber-bullying in the list of unacceptable uses of district equipment.
- If your district imposes disciplinary consequences for off-campus behavior, notify students and parents of this fact in your student code of conduct and other communications.
- Consider training administrators on these issues, including the fact that courts generally are not impressed by the mere fact that off-campus website expression might be offensive or controversial.
- Consult your school attorney on issues of discipline for off-campus conduct, especially where there might be free speech issues.
- Consider educational options, such as teaching students about the responsibilities that come with the power of the Internet and teaching parents about ways to make sure they know what their children are doing online.